NO. 87-706

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARY KATE LEAMAN,

Petitioner,

v.

OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, et. al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. IS A VOLUNTARY WAIVER OF ANY CAUSE OF ACTION AGAINST A STATE'S EMPLOYEE IN EXCHANGE FOR AN OTHERWISE UNAVAILABLE RIGHT TO SUE THE STATE CONSTITUTIONALLY PERMISSIBLE?

2. IS A RATIFICATION BY AN APPELLATE COURT MAJORITY OF A VOTE FOR AN EN BANC HEARING CONSISTENT WITH THE PURPOSES AND POLICIES OF 28 U.S.C. SECTION 46(c)?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the lower courts are: Mary Kate Leaman, plaintiff; Ohio Department of Mental Retardation and Developmental Disabilities (ODMR/DD), Minnie Fels Johnson, former director of ODMR/DD, Sandra Crockett, Loyce Scott, and Shirley Wilson-Young, employees of ODMR/DD, all defendants.

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OPINIONS BELOW

The *en banc* opinion of the Court of Appeals of July 23, 1987, reported at 825 F.2d 946, is reprinted in the petitioner's Appendix. The opinion by the panel of the Sixth Circuit Court of Appeals rendered on July 10, 1986, is reprinted in the petitioner's Appendix.

The order of the United States District Court for the Southern District of Ohio of May 14, 1985, reported at 620 F.Supp. 783, is reprinted in the petitioner's Appendix. The order and judgment of the District Court of June 13, 1985, is reprinted in the petitioner's Appendix.

The decision and judgment entry of the Ohio Court of Claims, filed May 8, 1985, is reprinted in the petitioner's Appendix.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended December 29, 1979, P.L. 96-170, Section 1, 93 Stat. 1284).

Ohio Revised Code Section 2743.02(A).

The state hereby waives, . . . its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter . . . . [F]iling a civil action in the court of claims results in a complete waiver of any causes of action, based on the same act or omission, which the filing party has against any state officer or employee. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officers or employees office or employment or that the officer or employee acted with malicious purpose, in bad faith or in a wanton or reckless manner.

STATEMENT OF THE CASE

The petitioner, Mary Kate Leaman, was hired by the Ohio Department of Mental Retardation and Developmental Disabilities (ODMR/DD) as a case management specialist on December 12, 1983. She was hired as a probationary employee whose appointment was not to become final until she had satisfactorily served a probationary period fixed by regulation at 120 calendar days, as required by Ohio Revised Code Section 124.27. Prior to the completion of that probationary period, she was notified by letter from two of her supervisors that her service was not satisfactory and that she was being removed from her position. The letter, dated April 4, 1984, specified a number of reasons why it had been concluded that she could not meet the requirements of her job.

The petitioner appealed her discharge to the State Personnel Board of Review, which dismissed her appeal. She then brought her federal court action on July 11, 1984 against the Department and four of her superiors, all employees of ODMR/DD. The complaint was brought pursuant to 42 U.S.C. Section 1983 and 29 U.S.C. Section 794 (the Rehabilitation Act of 1973) alleging that she had been terminated for expressing disagreement with controversial department policies regarding mildly retarded individuals. She alleged a deprivation of her rights under the First and Fourteenth Amendments. The complaint sought reinstatement with backpay, an award of costs and attorney's fees, injunctive relief, and punitive damages of $25,000 against each individual defendant.

After suing the defendants in federal court, the petitioner, on December 14, 1984, elected to file a virtually identical complaint in the Ohio Court of Claims against ODMR/DD alone.

Judge Rubin thereafter dismissed the federal action. ODMR/DD was dismissed on sovereign immunity grounds. As to the individual defendants, Judge Rubin applied a

provision of the Ohio Court of Claims Act that reads in pertinent part as follows:

> Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or ommission, which the filing party has against any state officer or employee.

Ohio Revised Code Section 2743.02(A)(1). The petitioner was informed that she could refile her claims against the individual defendants should the state claims court find that the individual defendants acted outside the scope of their employment or with malice, bad faith, wantonness or recklessness.

The Ohio Court of Claims also dismissed the petitioner's complaint, holding on a final appealable decision that Ms. Leaman's discharge was in accordance with state law. The Court of Claims also held that a probationary state job does not constitute "property" protected under the Due Process Clause of the Fourteenth Amendment. The Ohio Court of Claims was unmoved by Ms. Leaman's First Amendment and Rehabilitation claims:

> By what ever name the claims are made, this court construes it as an appeal challenging the judgment and decision of the state agency. The court could visualize situations where every person terminated during a probationary period could claim that his First Amendment Right of 'free speech' has been violated. This court highly questions whether that is the intent of the First Amendment. As to the 29 U.S.C. 794 and 794(A), these deal with the rights of handicapped persons. To permit a probationary worker who has worked in her probationary position for less than 120 days, and who obviously disagreed with her superiors to state a cause of action. . .would, [in] this court's opinion, represent an entirely untenable position.

(App. p. 72a).[1]

The judgment in favor of ODMR/DD was not challenged. The petitioner did appeal the district court's holding that by electing to sue the Department (the State of Ohio) in the Ohio Court of Claims, she voluntarily waived her cause of action against the individual defendants.

By divided vote, a three-judge panel reversed the order dismissing the case against the individual employees. (App. p. 48a). On petition for rehearing, eight of fifteen active judges of the full court voted to rehear the case *en banc*, as authorized by 28 U.S.C. Section 46(C), and an order was entered vacating the panel decision. After reargument, but before the issuance of any final decision, one of the judges who had voted for the rehearing *en banc* recused himself from further participation. A question was then raised at an administrative meeting of the court as to whether recusal ought to be deemed to relate back to the vote on the petition for rehearing. Chief Judge Lively ruled that the recusal was not retroactive. After discussion, and on motion duly made and seconded, the court voted to "sustain the ruling of the chair and to ratify the action of the court in voting for *en banc* rehearing." (App. p. 3a). Only three of the remaining fourteen judges voted against the motion.

By an eight to six margin, the Court of Appeals voted to affirm the decision of the district court dismissing the petitioner's federal claims against the individual defendants. (App. p. 1a).

REASONS FOR DENIAL OF THE WRIT

I. A VOLUNTARY WAIVER OF ANY CAUSE OF ACTION AGAINST A STATE EMPLOYEE IN EXCHANGE FOR AN OTHERWISE UNAVAILABLE RIGHT TO SUE THE STATE IS CONSTITUTIONALLY PERMISSIBLE.

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[1] All references to the appendix (App.) are references to the appendix and corresponding page numbers attached to the petition for a writ of certiorari and have not been duplicated as an appendix to this brief in opposition.

A. The Choice Afforded The Petitioner Cannot Be Construed To Limit Her Claims Under 42 U.S.C. Section 1983.

The Ohio Court of Claims Act waives the state's sovereign immunity and declares that the state consents to be sued in the Court of Claims. Ohio Revised Code Section 2743.02(A)(1) provides in pertinent part:

> The state hereby waives,. . .its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter. . . [F]iling a civil action in the court of claims results in a *complete* waiver of *any* causes of action, based on the same act or ommission, which the filing party has against any state officer or employee. (emphasis added).

Plaintiffs who might wish to take advantage of the state's waiver of sovereign immunity are put on notice that the waiver will be effective as to them only if they themselves waive any cognizable claims they might have against the state's employees.

The *en banc* opinion correctly characterized Ohio Revised Code Section 2743.02 to include waiver of federal, as well as state, claims for relief:

> The word "any," as used in the statute, is unambiguous. *See United States v. Winston*, 793 F.2d 754 (6th Cir. 1986), holding that even under the strict construction accorded criminal statutes, the words "any court," as used in 18 U.S.C. Section 922(h)(1), are "patently unambiguous" and do not exclude foreign courts.

(App. p. 9a). Without a doubt, the Ohio legislature, in providing that an election to sue the state in the Ohio Court of Claims results in a complete waiver of any cause of action against individual officers or employees, clearly provided for waiver of federal causes of action, as well as actions based upon state law.

The petitioner had been given the choice to sue "the individual state employees for damages under Section 1983

just as if the Ohio Court of Claims Act had never been passed at all, or she could choose to avail herself of an opportunity not available before the Ohio Court of Claims Act was passed - the opportunity to exchange her damage claim against the state's employees for a damage claim against the State itself." (App. p. 16a). The petitioner erroneously asserts that this choice somehow improperly limited her right to proceed under 42 U.S.C. Section 1983 in federal court independent of state-created remedies and procedures. The Ohio Court of Claims Act does not require litigants to exhaust available state remedies as the petitioner suggests. Rather, as appropriately recognized by the Sixth Circuit, "[t]he Ohio statute gives claimants an option not otherwise available to them, and any claimant who does not like the statutory option is perfectly free to reject it and prosecute a Section 1983 action against the state's officials just as if the Ohio Court of Claims Act had never been passed." (App. p. 13a). She was not required to exhaust state remedies, rather, as the district court accurately stated:

> In exchange for [waiver of her claims against officers and employees of the state], Plaintiff received a solvent Defendant. There being no statutory or constitutional impediment to such an arrangement, this Court will hold Plaintiff to her quid pro quo. . .

Nor can the voluntary waiver of a federal civil rights claim be construed as a waiver of federal court jurisdiction.

> Under the terms of the Ohio statute, acceptance of the statutory offer results not in a waiver of federal jurisdiction to entertain suits against state employees, but in a waiver of "any cause of action" the waiving party may have against such employees. Where a claimant elects to sue the state in the Court of Claims, in other words, the state's employees are given an affirmative defense, which the federal court has both the jurisdiction and the duty to recognize. This case did not present a situation in which the federal courts had been deprived of jurisdiction,. . ., the defendants were entitled to summary judgment not because the court had no jurisdiction, but because the plaintiff had no case.

(App. p. 14a). The case was properly dismissed for failure to state a claim. The Ohio Court of Claims Act does not in any way interfere with federal court jurisdiction.

B. The Sixth Circuit's Decision Is Consistent With Existing Precedent.

The petitioner's reasonable and meaningful choice to sue the State in the Ohio Court of Claims, resulting in a knowing, intelligent and voluntary waiver of her possible claims against state officers and employees is no different than a settlement, an accord and satisfaction.

> If in the case at bar the defendant officials had pleaded and proved an accord and satisfaction - if they had shown that Ms. Leaman had given them a written release of all claims in exchange for a monetary consideration - the defendants would surely have been entitled to a dismissal, and surely the dismissal would not be thought to frustrate the policy underlying §1983. In practical effect the Ohio Court of Claims Act is a standing offer of settlement of claims against state employees in exchange for an otherwise non-existent opportunity to sue the state itself for damages.

(App. p. 13a). As the Sixth Circuit noted, "[t]he constitutionality of such an offer can hardly be doubted in light of *Town of Newton v. Rumery*, 480 U.S. ____, 107 S. Ct. 1187, 94 L.Ed.2d 405 (1987)." (App. p. 13a).

In *Rumery* the Supreme Court held that a man who accepted a municipality's offer to dismiss criminal charges against him in exchange for a waiver of any claims he might have against the town and its officers could not repudiate the waiver and sue the town and its officers under 42 U.S.C. Section 1983. Mr. Rumery's voluntary decision to accept the town's offer, the Court said, reflected "a highly rational judgment" that the obvious and certain benefits offered by the agreement would "exceed the speculative benefits of prevailing in a civil action [under Section 1983]." 107 S. Ct. at 1193, 94 L.Ed.2d at 417.

The Sixth Circuit properly determined that "[t]he inducement offered for Ms. Leaman's waiver (an opportunity to bring a direct action for damages against the State of

Ohio) obviously lacked the potential for coercion inherent in the inducement (dismissal of criminal charges) offered for the waiver in *Rumery*." (App. p. 14a). The Sixth Circuit further determined properly that "the benefits offered in the Ohio Court of Claims Act [are] no less 'obvious' than those offered Mr. Rumery, and Ms. Leaman's election to accept Ohio's offer [is] no less 'rational' than the election made by Mr. Rumery" and found that dismissal of Ms. Leaman's case was even more clearly correct than the corresponding decision in Mr. Rumery's case. *Id.*

Contrary to the petitioner's assertions, the waiver in the Court of Claims Act is no more automatic than the waiver made by Mr. Rumery. The waiver in the Ohio Court of Claims Act is only valid after the plaintiff's knowing, intelligent and voluntary decision to accept the state's offer for an otherwise non-existent opportunity to sue the state itself for damages, and the subsequent act of filing in the Ohio Court of Claims. It is not automatic. The petitioner did not have to choose to sue the state for damages before she could file against state officer's and employees in federal court.

The petitioner further asserts that there was no issue of federal jurisdiction over federally created rights implicated in the *Rumery* decision. Nor does the instant case involve federal jurisdiction over federally created rights. It does not involve the waiver of federal jurisdiction, rather it involves an affirmative defense resulting in the failure to state a claim upon which relief can be granted.

Another analogy can be drawn to the waiver of constitutional rights that occurs in a criminal case when a defendant pleads guilty. By pleading guilty in a criminal case, a defendant waives his Fifth Amendment right against self-incrimination and Sixth Amendment rights to a trial by jury, to representation by counsel, and to confront his accusers. *Boykin v. Alabama*, 395 U.S. 238 (1969). The waiver of these rights is constitutionally permissable where a guilty plea represents a voluntary and knowing choice made by an accused person. *North Carolina v. Alford*, 400 U.S. 25 (1970).

If a defendant in a criminal action may waive such fundamental constitutional rights having a direct bearing on his personal liberty, there certainly cannot be any constitutional impediment to a plaintiff in a civil action waiving a federally created cause of action against state employees in order to directly sue the state itself.

The choice to be made by a plaintiff when deciding whether to sue the state or its employees can be no more difficult than the choice to be made by a criminal defendant when contemplating the choice between pleading guilty to gain a reduced sentence and taking his chances at acquittal in front of a jury. In either instance, a choice must be made whether to waive certain rights. For the criminal defendant, those rights are created by the Constitution; for the civil plaintiff, the right is a cause of action created by Congress. It is only logical to conclude that if a defendant in a criminal action can waive rights guaranteed by the Constitution, a plaintiff in a civil case can waive a legislatively created claim for relief.

In the final analysis, no interference with federal jurisdiction results from applying the waiver provision of 2743.02(A)(1) to a Section 1983 action, because the waiver can occur only through the voluntary action taken by the plaintiff. The dismissal of a federal claim can occur only as a result of the plaintiff's voluntary choice to sue the state in the Ohio Court of Claims. The choice of whether to pursue a federal or Ohio Court of Claims action remains within the sole discretion of the plaintiff. A litigant's voluntary choice to waive Section 1983 claims against state employees in no respect undermines or limits the jurisdiction of a federal court.

It must also be noted that the petitioner was represented by counsel when she made her choice to file in the Ohio Court of Claims.[2] The Sixth Circuit presumed that her counsel was competent and further presumed that her counsel knew the price of suing the state in the Ohio Court of Claims:

> It was not the duty of any court to explore the adequacy of communication between client and counsel before permitting the complaint in the Court of Claims suit to be accepted for filing. And where a claimant represented by competent counsel has elected to accept Ohio's statutory offer

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[2] It must be noted that the petitioner still sees her legal proceedings as strategic moves. (Pet. for Writ of Cert. p. 4, n. 1). In fact, the petitioner initially had several options, including, first, if she felt that the individuals' conduct was malicious or manifestly outside the scope of their employment she could file in federal court under Section 1983 as if the Ohio Court of Claims did not exist; second, if she felt that the individual employees did not act maliciously or manifestly outside the scope of their employment, she could file against the State in the Ohio Court of Claims, thereby agreeing to waive any claims aginst the individual employees; or, third, if she wasn't sure of their conduct she could file in both courts, again agreeing to waive any claims against the individual employees. But in the latter case, if the Ohio Court of Claims determined that the individuals acted manifestly outside the scope of their employment, or with malicious purpose, in bad faith, or in a wanton or reckless manner, the waiver would have been void and she could continue to pursue her actions against the individuals. It was a choice she made which she now must accept.

Further, the petitioner notes that the successful interposition of immunity defenses for the individual defendants in a federal action "may leave the state as the only viable defendant." She fails to note, however, that the State is a viable defendant only if she accepts the State's heretofore unavailable consent to suit in exchange for a waiver of claims against the individual employees.

Finally, the petitioner erroneously asserts that if the individual defendants were found to be acting in their official capacities continuation of the suit would be barred in federal court pursuant to the Eleventh Amendment. To the contrary, there can be no doubt that a suit for prospective injunctive relief against individual defendants acting in their official capacities is not barred by the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332 (1978). The petitioner's complaint includes a claim seeking prospective injunctive relief.

> to subject itself to suit in the Court of Claims in exchange for a waiver of claims against individual state officials, nothing in the Constitution entitles the claimant to repudiate the waiver if he or she loses the suit in the Court of Claims and does not even appeal the decision.

(App. p. 19a).

C. The Ohio Court Of Claims Act Does Not Limit, Prohibit Or Interfere With Enforcement Of Claims Under Section 1983.

The petitioner erroneously asserts that her choice to accept the offer to sue the State of Ohio in exchange for a waiver of her possible claims against the state's officers and employees under 42 U.S.C. Section 1983 somehow interfered with a right to "full and fair opportunity to be heard". She misconstrues the nature and application of the waiver provision. The waiver of claims against individuals occurs not as a result of these claims being decided by the Ohio Court of Claims, but by a plaintiff's filing of a claim against the state based on the same act or occurrence. It is the act of filing the complaint against the state that causes the waiver to occur. The only condition under Ohio Revised Code Section 2743.02(A)(1) that causes the waiver to be void is if the Ohio Court of Claims should determine that the employee acted manifestly outside the scope of his employment, with malicious purpose, in bad faith or in a wanton or reckless manner.

Even so, the petitioner is incorrect in stating that the Ohio Court of Claims did not address her federal claims. At page 8 of its opinion the Ohio Court of Claims rejected those claims:

> This court fully realizes that the plaintiff in a rather lengthy and detailed complaint and equally lengthy and detailed memorandum contra plaintiff's motion to dismiss has set up claim violations of plaintiff's First Amendment Right of "free speech". The court is also fully aware that the plaintiff has alleged violations of 29 U.S.C. 794 and 794(A). By what ever name the claims are made, this court construes it as an appeal challenging the judgment and decision of the state agency. The court could visualize situations where every person terminated

> during a probationary period could claim that his First Amendment Right of "free speech" has been violated. This court highly questions whether that is the intent of the First Amendment. As to the 29 U.S.C. 794 and 794(A), these deal with the rights of handicapped persons. To permit a probationary worker who has worked in her probationary position for less than 120 days, and who obviously disagreed with her superiors to state a cause of action even with the broad rights under the O'Brian case would, [in] this court's opinion, represent an entirely untenable position.

(App. p. 72a).

Further, the statute voids the waiver only if the court[3] determines that the individual defendants acted manifestly outside the scope of their employment or maliciously. The Sixth Circuit concluded "[i]n deciding as it did, that the termination of Ms. Leaman's employment 'was in accordance with law,' the Ohio Court of Claims can hardly be said to have determined that it was ultra vires or malicious." (App. p. 11a). The Sixth Circuit further concluded that "[t]his is dispositive of Ms. Leaman's claim that the waiver is void under the terms of the statute . . ." *Id.* Significantly, the petitioner chose not to appeal the Ohio Court of Claims determination on these issues.

D. The Sixth Circuit Decision Is Entirely Consistent With Decisions Of Other Circuits Allowing Waiver Of Rights.

The petitioner's assertion that the Sixth Circuit decision conflicts with decisions of other circuits as to the primacy of federal claims is unfounded. Her argument relies on *Rosa v. Cantrell*, 705 F.2d 1208 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983). That case involved a Wyoming workers' compensation act that said the rights and remedies provided in the act "are in lieu of all other rights and remedies. . ." Wyo. Stat. 27-12-103(a) (1977). As such, it purported to bar recovery against a municipal employer under §1983 and had to yield to the federal statute under the Supremacy Clause.

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[3] The words "the court" means the Ohio Court of Claims. *Von Hoene v. State*, 20 Ohio App. 3d 363, 486 N.E. 2d 868 (Hamilton 1985).

Clearly, Wyoming attempted to make workers' compensation the exclusive remedy, without choice, thus absolutely barring any claim or recovery under Section 1983. The Sixth Circuit accurately notes the difference here:

> *Rosa v. Cantrell* and comparable workers' compensation act cases are not controlling here, in our judgment, precisely because the workers' compensation acts purport to bar actions brought in another forum under another statute, while the Ohio Court of Claims Act does not. In no way does the Ohio statute shut the doors of federal courts on claimants who are unwilling to forego suit there. It does not deprive claimants of their federal forum. The Ohio statute simply offers to make available an otherwise unavailable deep-pocket defendant, and an alternative forum, if prospective plaintiffs who think they have claims against individual state employees voluntary elect to waive suit against the employees in favor of suit against the employer.

(App. p. 12a). While the Wyoming statute tried to create an exclusive remedy, thereby barring any and all Section 1983 claims, "[t]he Ohio statute gives claimants on option not otherwise available to them, and any claimant who does not like the statutory option is perfectly free to reject it and prosecute a §1983 action against the state's officials just as if the Court of Claims Act had never been passed." (App. p. 13a).

The exclusivity provision in *Rosa* is not present in the instant case. *Rosa*, therefore is not controlling and does not conflict with the Sixth Circuit decision. The exclusivity provision of the New York Workers' Compensation Law in *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir. 1986) similarly does not apply here.

Clearly, the Ohio Court of Claims Act is not in conflict with Section 1983. The other cases cited by the petitioners are equally inapplicable and thus not in conflict with the Sixth Circuit decision. The Ohio Court of Claims Act does not limit the scope or amount of damages recoverable under Section 1983 and does not create any preconditions to a suit under Section 1983. Finally, again the petitioners cite a case involving jurisdictional issues when the jurisdiction of the federal court is not at issue.

The petitioner, therefore, has failed to show how the Ohio Court of Claims Act conflicts with Section 1983, has failed to cite any cases in conflict with the Sixth Circuit decision, and has failed to show how the application of the Ohio Court of Claims Act conflicts with the Supremacy Clause. The Sixth Circuit accurately notes "Constitutional rights may not be extinguished by any statute, state or federal, but this truism does not mean that suits or potential suits for alleged violation of such rights may not be compromised or waived. *See Home Insurance Company of New York v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) (" . any citizen may no doubt waive the right to which he may be entitled"). (App. p. 18a).

The nature and operation of the statute was aptly characterized in the dissent from the Sixth Circuit panel decision.

> Ohio has made a standing offer for such a mutual waiver in O.R.C. §2743.02. The statute in effect tells the citizen who has a grievance against the State of Ohio and one of its officials that he is perfectly free to sue either the State or the individual official, but if he wants the State to waive its sovereign immunity, he must waive his claim against the official. The plaintiff in the case at bar chose to do that, giving up her claim against the official in exchange for an opportunity to take her chances on an action against the State in the Ohio Court of Claims—an action the State was not required to let her bring, and in which the prospects for full recovery on any judgment would have been excellent had she prevailed. Not having fared as well as she had hoped to in the Court of Claims, plaintiff now seeks to repudiate her bargain and return to square one. I agree with the district court that she has no constitutional right to do so.

(App. p. 52a).

II. RATIFICATION OF AN APPELLATE COURT MAJORITY OF A VOTE FOR *EN BANC* HEARING IS CONSISTENT WITH THE PURPOSE AND POLICIES OF 28 U.S.C. SECTION 46(c).

Following the divided three-judge panel reversal of the district court's order, eight of fifteen active judges of the full

court voted to rehear the case *en banc*, as authorized by 28 U.S.C. Section 46(c). The panel decision was vacated. After reargument, but before the issuance of any final decision, one of the judges who had voted for rehearing *en banc* recused himself from further participation. The issue was raised at an administrative meeting whether the recusal ought to be deemed to relate back to the vote on the petition for rehearing. Chief Judge Lively ruled that recusal was not retroactive, and upon motion the court voted to sustain Judge Lively's ruling and to ratify the action of the court in voting for *en banc* hearing. In fact, only three of the remaining fourteen judges voted against ratification of the vote for *en banc* hearing. As the Sixth Circuit stated, "[w]hen an absolute majority of the full court acting without the recusing judge, voted to 'ratify' the action of the court in voting for an en banc rehearing; it was voting *nunc pro tunc* to rehear the case en banc." (App. p. 6a).

The actions of the Sixth Circuit regarding rehearing and recusal is consistent with at least one other circuit. *See United States v. Widgery*, 778 F.2d 325 (7th Cir. 1985), and *United States v. Murphy*, 768 F.2d 1518, 1541 (7th Cir. 1985) *cert. denied*, ____ U.S. ____, 89 L.Ed. 2d 304 (1986). Voting on whether to rehear a case *en banc* "is essentially a policy decision of judicial administration," *Moody v. Albermale Paper Co.*, 417 U.S. 622, 627 (1974), and a policy decision as to which "each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how the power should be exercised." *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 259 (1953). The end to be served by such decisions "is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions . . ." *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 689-90 (1960) (quoting Maris, "Hearing and Rehearing Cases in Banc," 14 F.R.D. 91, 96 (1954)). These policy concerns were most certainly served by the full court hearing and deciding the case.

There are additional reasons why the recusal in the instant case should not be applied retroactively. Section 455(a) requires disqualification where a judge's impartiality "might reasonably be questioned." The recusing judge, who was a member of the Ohio House of Representatives and who was a sponsor of the Ohio Court of Claims Act "has never believed that his role as a legislator could reasonably draw

into question his ability to participate impartially as a judge in this case." (App. p. 4a). As the Sixth Circuit notes, "[w]e are not required to decide whether he is correct in this, but we note that his view is consistent with the practice of the late Chief Justice Fred Vinson and the late Justices Harold Burton and Hugo Black, who as members of the United States Supreme Court routinely sat on cases involving legislation passed while they were members of Congress." *Id.* As the Sixth Circuit further noted, "we know of no published decision holding that the practice followed by Chief Justice Vinson and Justices Burton and Black is no longer permissible." (App. p. 5a).

Finally, on the issue of recusal, the petitioner cites *Lifeborg v. Health Services Administration Corp.*, 796 F.2d 796, 802 (6th Cir. 1986), *cert. granted*, ____ U.S. ____, 107 S. Ct. 1368 (1987). In *Lifeborg* the Fifth Circuit ruled that a district court judge who acquired actual knowledge that the university on whose board of trustees he served had an interest in the outcome of the decision he rendered should have recused himself under 28 U.S.C. Section 455(a). Such is not the case in the instant action. As the Sixth Circuit noted, "[a]ssuming that the recusing judge's sponsorship of the Ohio Court of Claims Act constituted a public expression of opinion on the constitutionality of the particular section of the law involved in this case, such an expression of opinion on a pure question of law in a context involving none of the parties to this case is comparable to a similar expression of opinion by a judge who has had occasion to address a particular question of law in a prior judicial opinion." (App. p.5a). The situation in *Lifeborg* is totally dissimilar to the instant case.

The policy considerations of 28 U.S.C. 46(c) have been clearly established and have been served by the actions of the Sixth Circuit in the instant case.

III. CONCLUSION

The petitioner has failed to raise an issue deserving of review by this Court. Petitioner has made a knowing, intelligent and voluntary waiver of her right to bring claims against officers and employees of the state in exchange for an otherwise unavailable suit against the state. There being no statutory or constitutional impediment to such an arrangement the petitioner must be held to her *quid pro quo*. Petitioner has not presented this Court with any decisions which establish a conflict in the circuit courts or provide any basis for granting the writ of certiorari. Finally, the recusal given a prospective application is consistent with 28 U.S.C. Section 46(c) and is not in conflict with any other decisions or policies. Accordingly, the petition for writ of certiorari must be denied.

Respectfully submitted,

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